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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1997

CONNECTICUT BOARD OF PARDONS, ET AL.

Petitioners

-vs-

DAVID DUMSCHAT

Respondent

JAMES BROWN, STANLEY CZAJA and

JAMES SHELTON

Intervening Respondents

CONNECTICUT BOARD OF PARDONS, ET AL.

Petitioners

-vs-

JAMES BROWN, STANLEY CZAJA and

JAMES SHELTON

Respondents

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Respondents James Brown and Stanley Czaja, who are currently incarcerated in the Connecticut Correctional Institution at Enfield, Connecticut, ask leave to file their Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

Respondents' brief was mailed June 25, 1980. Their affidavit in support of this motion will be sent under separate cover. The two other named representatives of the Respondent class in this action, DAVID DARNSCHAT and JAMES SHELTON, have received pardons and hence the action is moot as to their individual claims and they are not filing affidavits to proceed in forma pauperis.

Stephen Wizner

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Counsel for Respondents

CERTIFICATION

I hereby certify that a true copy of the foregoing was mailed to Stephen J. O'Neill, Esq., Assistant Attorney General, 340 Capitol Avenue, Hartford, Connecticut, this 25 day of June, 1980.

Stephen Wizner

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BRIEF IN OPPOSITION TO A

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The respondents, a class composed of approximately 35 inmates serving life terms of incarceration in the Connecticut correctional system, adopt the statement of the petitioners (Connecticut Board of Pardons), and direct the attention of the Court to the opinions appended to the petition.

JURISDICTION

The respondents adopt the statement of the Connecticut Board of Pardons.

QUESTION PRESENTED

The respondents adopt the statement of the Connecticut Board of Pardons.

CONSTITUTIONAL PROVISION INVOLVED

The respondents adopt the statement of the Connecticut Board of Pardons.

STATEMENT OF THE CASE

Procedural History

In February, 1976, David K. Dumschat instituted an action in the District Court for the District of Connecticut. At that time he was serving a sentence of life imprisonment at the Connecticut Correctional Institution at Enfield following a homicide conviction in 1964. Prior to February, 1976, Mr. Dumschat had appeared before the Board of Pardons several times but had never been told why he had been denied a pardon. After an evidentiary hearing and additional submissions of written evidence by the Connecticut Board of Pardons, Judge Blumenfeld issued a declaratory judgment on June 16, 1977, that Mr. Dumschat was entitled to a written statement of reasons and the facts relied upon when the Board of Pardons denied him a pardon. Dumschat v.

Connecticut Board of Pardons, 432 F. Supp. 1310 (D. Conn. 1977). However, also on June 16, 1977, Mr. Dumschat received a pardon from the Board of Pardons, which reduced his minimum sentence to time served.

The Board of Pardons appealed Judge Blumenfeld's judgment to the United States Court of Appeals for the Second Circuit. On August 16, 1977, the Board of Pardons filed a motion with the Court, requesting that the judgment of the District Court be vacated and that the case be remanded. On August 29, 1977, the Board filed a motion with the District Court to vacate the judgment and dismiss the complaint as moot. On September 13, 1977, David Dumschat consented to have the suit remanded to the District Court.

On December 20, 1977, while the two motions were pending, James Brown, Stanley Czaja, and James Shelton filed a separate action claiming that their constitutional rights to due process of law had been denied when the Board of Pardons denied them pardons without providing a statement of reasons for each denial. All three were serving life sentences at the Connecticut Correctional Institution at Enfield and had been denied a pardon without being given a statement of reasons.

In January, 1978, the Court of Appeals remanded Mr. Dumschat's suit without further instructions. Following Judge Blumenfeld's denial of the motions to vacate the judgment and dismiss the complaint, Brown, Czaja, and Shelton filed motions to intervene in Dumschat, to consolidate their action with Dumschat, and to have this consolidated action certified as a class action.

The Board of Pardons did not oppose any of these motions and Judge Blumenfeld granted them. The parties agreed and Judge Blumenfeld ordered that the record in Dumschat be included in the consolidated actions. By stipulation of the parties, the record in Carrona v. Manson et al. (D. Conn., Civil No. H-74-377) was also made a part of the record in this action. Carrona involved

a similar claim, but was dismissed as moot before decision when Mr. Carrona received a pardon.

On August 16, 1978, Judge Blumenfeld ruled in favor of the plaintiff class, ordering that the Board of Pardons furnish any inmate serving a life sentence with a written statement of reasons and facts relied upon when the inmate is denied a pardon by the Connecticut Board of Pardons when the nature of the pardon would be reduction of sentence and advancement of parole eligibility. Dumschat v. Connecticut Board of Pardons, 462 F. Supp. 509 (D. Conn. 1978).

On September 29, 1978, the Board of Pardons appealed the judgment to the United States Court of Appeals for the Second Circuit, where argument was heard on January 9, 1979. The Court of Appeals on January 11, 1979 issued a per curiam decision affirming the District Court's judgment and opinion. Dumschat v. Connecticut Board of Pardons, 593 F. 2d 165 (2d Cir. 1979).

The Board of Pardons petitioned this Court for a writ of Certiorari. The petition was granted on June 11, 1979, when the Court vacated the judgment of the Court of Appeals and remanded the case to that Court "for further consideration in light of Greenholtz v. Inmates of Nebraska Penal Complex, 442 US [1]"

After requesting and receiving additional briefs which dealt with the applicability of Greenholtz to the instant case, the Court of Appeals for the Second Circuit once more ruled in favor of the respondents. On March 20, 1980, the Court held that "the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected 'liberty' interest in the pardons process" and that "the due process rights which attend this protected interest require that life inmates receive written explanations of adverse decisions by the Board of Pardons." Connecticut Board of Pardons v. Dumschat, No. 78-2124, p.1961. The Court did not enter a final judgment but remanded the case to the district court "to determine at what point in an

inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to invest him with a protected 'liberty' interest and due process rights." No. 78-2124 p. 1962.

Despite the fact that this case is now before the District Court in accordance with the Second Circuit's remand, petitioners have applied for a writ of certiorari from this Court. For the reasons set forth below, respondents contend that the petition should be denied.

REASONS FOR DENYING THE WRIT

I. A WRIT OF CERTIORARI CANNOT BE GRANTED BECAUSE A FINAL DECREE HAS NOT BEEN ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Rule 20 of the Rules of this Court states:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

As noted above, this case has been remanded by the Court of Appeals to the District Court, and no showing of special importance has been made, or even alleged, by the petitioner. A grant of the petition would thus be inconsistent with the Rules of this Court and would entail a departure from the settled doctrine of this Court as laid down in Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 US 251, (1916) a case rather similar to this one. Hamilton-Brown involved a complaint of trademark infringement and unfair competition. The trial court had originally dismissed the complaint, but its decision was reversed by the Eighth Circuit Court of Appeals which found the defendant guilty of unfair competition and remanded the case to a special master for consideration of the issue of damages. The defendant thereupon petitioned the Supreme Court for a writ of certiorari. The writ was denied. Eventually, the master's finding of damages was appealed to the court of original jurisdiction; that court's finding was appealed to the Court of Appeals for the Eighth Circuit, and only after the appellate court had entered a final decree for damages did the

Supreme Court grant certiorari. In his opinion for the Court, Mr. Justice Pitney responded to the plaintiff's contention that the Court's initial denial of certiorari precluded consideration of all issues but that of damages. He wrote that the initial denial of certiorari had not been predicated in any way upon the Court's agreement or disagreement with the Eighth Circuit's opinion but upon the fact that the issue had not been ripe for review.

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision....And, except in extraordinary cases, the writ is not issued until final decree....The decree that was sought to be reviewed by certiorari at complainant's insistence was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application....."

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 US 251, 258.

This Court's decision in Hamilton-Brown has never been overruled. In Brotherhood of Locomotive Firemen & Engineermen et al. v. Bangor & Aroostock Railroad Co. et al., 389 US 327 (1967), the decision was relied upon by the Court in its denial of certiorari. The District of Columbia Circuit Court of Appeals had decided several questions, but had remanded the case to the District Court for consideration of whether the defendants had been properly held in contempt of court. The Supreme Court refused to grant a writ of certiorari to consider any of the issues decided by the Court of Appeals while the remand was pending. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this court." Brotherhood of Locomotive Firemen & Engineermen et al. v. Bangor & Aroostock Railroad Co. et al., 389 US 327, 328.

This Court's decisions in Hamilton-Brown and Brotherhood of Locomotive Firemen preclude a grant of certiorari at the present time. The Court of Appeals for the Second Circuit has remanded this case for further evidentiary proceedings for the important purpose of determining the circumstances under which life inmates acquire a protected liberty interest in sentence commutations.

So long as this crucial issue remains unresolved and no final decree has been entered, this case is not ripe for the Supreme Court's review.

II. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DOES NOT DECIDE A FEDERAL QUESTION IN A WAY WHICH IS IN CONFLICT WITH AN APPLICABLE DECISION OF THE SUPREME COURT.

Rule 19.1.(b) of the Rules of this Court provides that one of the factors considered by the Court in deciding whether to grant or refuse a writ of certiorari is the question of whether "a court of appeals....has decided a federal question in a way in conflict with applicable decisions of this court...." Petitioner asserts that the recent decision of the Second Circuit is in conflict with this Court's decision in Greenholtz v. Inmates of Nebraska Penal Complex, 442 US 1, 1979. However, the Second Circuit devoted extensive consideration to Greenholtz, as it had been instructed to do by this Court, and held:

> "The overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms gives them a constitutionally protected interest in pardon proceedings. ....We find nothing in Greenholtz that precludes this holding."

Connecticut Board of Pardons v. Dumschat. No. 78-2124 pp. 1968-9.

The petitioners' claim that the Second Circuit did not act in agreement with the decision of this Court in Greenholtz is further belied by the fact that on two other occasions the Second Circuit overruled previous decisions in order to comply with Greenholtz. In Boothe v. Hammock, 605 F. 2d 661 (2d Cir. 1979), the Second Circuit overruled its decisions in United States ex rel. Johnson v. Chairman of New York State Board of Parole, 500 F. 2d 925 (2d Cir.), vacated as moot sub nom. Regan v. Johnson, 419 US 1015 (1974), and in Coralluzzo v. New York State Parole Board, 566 F.2d 375, (2d Cir. 1977), cert. dismissed as improvidently granted, 435 US 912, in holding that the establishment of a parole system does not create liberty interests in parole proceedings sufficient to trigger due process rights. A similar holding was reached in Pugliese v. Nelson, Nos. 79-2136, 2138, 2140 (2d Cir. March 4, 1980), which

overruled the decision reached in Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975), that the threat of "grievous loss" warranted due process protection. The Second Circuit has thus applied the dictates of Greenholtz extremely conscientiously, and petitioner's claim that the decision in this case contradicts Greenholtz is without merit.

III. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THIS COURT'S OPINION IN SCHICK v. REED.

Schick v. Reed, 419 US 256 (1974), is in no way applicable to the present case. In Schick, this Court held that Article 2, Section 2, Clause 1 of the United States Constitution conferred upon the President the power to grant conditional pardons. In doing so, the Court noted the "plenary" nature of the pardoning power. 419 US 256, 266. Petitioner seeks to analogize between this presidential power and that of the Connecticut Board of Pardons. The analogy fails for several reasons. First, the authority of the Board is statutory and is in no way predicated upon Article 2 of the United States Constitution. Second, the decision in Schick was in part founded upon an examination of "[t]he history of our executive pardoning power." 419 US 256, 262. The Second Circuit examined the history of the exercise of the pardoning power by the Connecticut Board of Pardons and held that the history itself had created a liberty interest sufficient to trigger the requirements of due process. Schick v. Reed is thus inapposite to the present case.

IV. THIS CASE DOES NOT PRESENT A QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

As the petitioner notes, Rule 19.1.(b) of the Rules of this Court provides that one of the factors relevant to the Court's decision to grant or deny a writ of certiorari is whether "a court of appeals has....decided an important question of federal law which has not been, but should be, settled by this court...." This case does not pose such a question because the Second Circuit's recent opinion is narrowly based upon the past practice of the

Connecticut Board of Pardons' exercise of its sentence commutation power. It is based upon unique circumstances and limited in its applicability. The Supreme Court has already established guidelines for determining the existence vel non of interests protected by due process in the series of cases beginning with Board of Regents v. Roth, 408 US 564 (1972), and continuing through Greenholtz. As the Second Circuit acknowledged throughout its opinion, this case is controlled by those guidelines. No novel issue of federal law is presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ON the Brief:

Eric Naiman
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CERTIFICATION

This is to certify that on this ___ day of June, 1980, two copies of this petitione for a writ of certiorari were mailed, postage prepaid, to Stephen J. O'Neill, 340 Capitol Avenue, Hartford, Connecticut, counsel for Petitioners.